IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARMAINE BROWN and ORAL DOUGLAS in their individual capacities and as Administrator of the Estate of SCHACQUIEL A. DAVIS	:	CIVIL ACTION
v.	:	
COMMONWEALTH OF PENNSYLVANIA, et al.	:	NO. 99-4901

MEMORANDUM AND ORDER

HUTTON, J. May 8, 2000

Currently before the Court are the defendants City of Philadelphia (the "City"), Mark T. Stewart ("Stewart"), and John Caffey's ("Caffey") Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (Docket No. 4), plaintiffs Charmaine Brown and Oral Douglas's (collectively, the "Plaintiffs") response thereto (Docket No. 9), defendant the Commonwealth of Pennsylvania Department of Health's (the "Commonwealth") Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) (Docket No. 8), Plaintiffs' response thereto (Docket No. 10), and the Commonwealth's reply brief (Docket No. 11). For the reasons stated hereafter, the City, Stewart, and Caffey's Motion is granted in part and denied in part, and the Commonwealth's Motion is granted.

I. BACKGROUND

This case arises out of the unfortunate and untimely death of Plaintiffs' one year old son, SCHACQUIEL Douglas (the "Decedent").

On April 22, 1998, the Decedent was at the residence of Angela Morris ("Morris"), his maternal aunt. Morris resides on Weaver Street in Philadelphia, Pennsylvania. While there, the Decedent choked on a grape. Morris dialed "911" at 11:06:22 am and informed the operator that her nephew was choking on a grape. The 911 operator called defendants Stewart and Caffey, advised them of the situation, and thereafter informed Morris that "[r]escue is gonna come to help you." (Compl. at ¶ 15). Stewart and Caffey were emergency medical technicians or EMTs at Engine 73, Fire House which is located at 76th Street and Ogontz Avenue, Philadelphia, Pennsylvania.

Morris neither attempted to dislodge the grape from the Decedent's throat nor drove him to nearby Germantown Hospital. At approximately 11:10:24 am, Morris again called 911 to determine when the EMTs would arrive. Morris was informed that "[r]escue was on the way." At approximately 11:14:50 am, when the EMTs still had not arrived, Morris placed a third call to the 911 operator. Morris was again told that help was on the way.

Stewart and Caffey eventually arrived at Morris's residence. They tried to restore the Decedent's breathing. When the Decedent "went into full code," they transported him to Germantown Hospital. (Compl. at ¶ 23). Once at Germantown Hospital, the grape was immediately removed from the Decedent's throat. He was then transferred to St. Christopher's Hospital for Children where he

died on April 24, 1998. Decedent's Death Certificate states that the cause of death was "asphyxia by choking."

Plaintiffs make the following allegations regarding the acts and/or omissions which culminated in the Decedent's death: (1) Stewart and Caffey failed to "exercise the well-established and universally recognized protocols for choking situations," (Compl. at ¶ 24); (2) neither Stewart nor Caffey attempted to "reach down and directly" remove the grape from the Decedent's throat, (Compl. at ¶ 25); (3) Stewart and Caffey did not arrive at the Morris residence in a more timely manner because they could not locate Weaver Street on the station map, (Compl. at ¶ 22); (4) when Stewart and Caffey left the station house to look for the Morris residence, they were lost, (Compl. at ¶ 22); (5) Stewart and Caffey were never provided "information on the neighborhood in which they were responsible for providing emergency services," and that they failed to familiarize themselves with the neighborhood, (Compl. at ¶ 28); (6) Stewart and Caffey "received absolutely no training regarding procedures on aiding, assisting and providing proper care and treatment to choking infants, nor on how to react when unable to locate a street address to which they were sent in response to a call for emergency assistance, nor on the procedures to take when unable to respond to a call in a timely manner," (Compl. at ¶ 29); (7) Engine 73, Fire House, the station from which Stewart and Caffey were dispatched, was staffed by technicians working overtime

from other units and that it was routinely staffed by technicians unfamiliar with the location of the local streets, (Compl. at ¶¶ 29-30); (8) Plaintiffs further allege that Engine 73, Fire House lacked a policy under which another unit would be dispatched if a previously dispatched unit could not locate the address to which it was sent, (Compl. at ¶ 31); and (9) Engine 73, Fire House failed to provide emergency assistance in response to Morris's 911 telephone calls. (Compl. at ¶ 31).

Plaintiffs name the Commonwealth, the City, Stewart, and Caffey as defendants. Count I of the Complaint states a cause of action under 42 U.S.C. § 1983 against Stewart and Caffey, for the deprivation of the Decedent's right to be free from unreasonable seizure in violation of the Fourth Amendment of the United States Constitution, for deprivation of his life, liberty, personal security, and bodily integrity without due process of law in violation of the Fourteenth Amendment of the United States Constitution, in deprivation of his precious rights, privileges, and immunities secured by the laws and Constitution of the Commonwealth. (Compl. at ¶¶ 37-39).

Plaintiffs' second cause of action is a § 1983 claim brought against the City for violations of the Commonwealth Constitution and the Fourth and Fourteenth amendments to the United States Constitution. Finally, Plaintiffs' third cause of action is a § 1983 claim brought against the Commonwealth for violations of the

Commonwealth Constitution and the Fourth and Fourteenth amendments to the United States Constitution. The Court now considers the pending motions to dismiss.

II. LEGAL STANDARD

When considering a motion to dismiss a complaint for failure to state a claim under Rule 12(b)(6),[1] this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them. Dismissal under Rule 12(b)(6) . . . is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)); see H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989). A court will only dismiss a complaint if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc., 492 U.S. at 249-50 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). Nevertheless, a court need not credit a plaintiff's "bald assertions" or "legal conclusions" when deciding a motion to

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1. Rule 12(b)(6) provides that:

> Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . .

Fed. R. Civ. P. 12(b)(6).

dismiss. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997).

III. DISCUSSION

As there are two pending motions to dismiss in this case, the Court hereafter separately considers each.

A. The Commonwealth's Motion To Dismiss

The Commonwealth asserts the defense of Eleventh Amendment immunity from suit. The Eleventh Amendment bars a suit against a state in federal court, regardless of the relief sought. See Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1124 (1996). Eleventh Amendment immunity applies to suits against department or agencies of the state having no existence apart from the state. See Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 280 (1977); Dill v. Pennsylvania, 3 F. Supp.2d 583, 586 (E.D. Pa. 1998). It also exists with regard to state officials acting within their official capacity. See Kentucky v. Graham, 473 U.S. 159, 166 (1985). The principle of sovereign immunity expressed in the Eleventh Amendment is a constitutional limit on federal judicial power. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984). Federal courts do not have jurisdiction to entertain claims against states, absent a waiver of sovereign immunity. Id. at 99, n.8. While sovereign immunity may be abrogated by Congress or waived by the state, the Supreme Court has held that § 1983 does

not abrogate the Eleventh Amendment. See Quern v. Jordan, 440 U.S. 332 (1979). By legislative enactment, Pennsylvania has expressly withheld consent to suit in federal courts: "Nothing contained in this subchapter shall be construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States." 42 Pa. Cons. Stat. Ann. § 8521(b).

The Commonwealth's Department of Health is an agency that does not have an existence apart from the Commonwealth. Likewise, the Medical Services Training Unit, an entity within the Department of Health's Division of Emergency Medical Services, does not have an existence apart from the Commonwealth. Therefore, the Department of Health is entitled to the sovereign immunity granted to the Commonwealth of Pennsylvania by the Eleventh Amendment.

Plaintiffs nevertheless argue that the Commonwealth waived its Eleventh Amendment immunity by enacting section 8522(b)(2) of Title 42 of the Pennsylvania Code. Section 8522(b)(2) states in relevant part as follows:

> (b) Acts which may impose liability.--The following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the defense of sovereign immunity shall not be raised to claims for damages caused by:
> . . .
> (2) Medical-professional liability.--Acts of health care employees of Commonwealth agency medical facilities or institutions or by a Commonwealth party who is a doctor, dentist, nurse or related health care personnel.

42 Pa. Cons. Stat. Ann. § 8522(b)(2). The applicability of section

8522(b) is not borne out by the facts of this case as neither the Department of Health, the Division of Emergency Medical Services, nor the Medical Services Training Unit may be sued on a theory of corporate negligence. Plaintiffs therefore cannot bring a cause of action arises from the policies, actions or inaction of a Commonwealth institution itself. Rather, liability may be founded upon the specific acts of individual Commonwealth employees. See Lor v. Commonwealth of Pennsylvania, CIV.A. No. 99-4809, 2000 WL 186839, at *4 (E.D. Pa. Feb. 4, 2000) (citing Moser v. Heistand, 681 A.2d 1322, 1326 (Pa. 1996) (the Pennsylvania Supreme Court held that this exception to sovereign immunity does not permit suits based on "corporate negligence" and that a plaintiff cannot bring a "cause of action [that] arises from the policies, actions or inaction of the institution itself rather than the specific acts of individual hospital employees")). In light of the foregoing, Plaintiff's reliance on section 8522(b)(2) is misguided. Accordingly, as this Court does not have subject matter jurisdiction over Plaintiffs' claim against the Commonwealth, the Commonwealth's Motion to Dismiss must be granted.

B. The City, Stewart, and Caffey's Motion To Dismiss

Plaintiffs' claims against the City, Stewart, and Caffey are brought pursuant to § 1983. The pertinent language of § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. "Section 1983 does not . . . create substantive rights; it provides only remedies for deprivations of rights established elsewhere in the Constitution or federal laws." Kneipp v. Tedder, 95 F.3d 1199, 1204 (3d Cir. 1996) (citing Baker v. McCollan, 443 U.S. 137, 144 n.3, 99 S. Ct. 2689, 2694 n.3 (1979); Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir.), cert. denied, 516 U.S. 858, 116 S. Ct. 165 (1995) (citation omitted)). A plaintiff seeking to advance a claim under § 1983 must establish: (1) the deprivation of a right secured by the United States Constitution or federal law; and (2) that the alleged violation was committed by a person acting under color of state law. See Kneipp, 95 F.3d at 1204. Not every wrong committed by a state actor is actionable under § 1983; only those wrongs that rise to a constitutional violation are actionable. See County of Sacramento v. Lewis, 523 U.S. 833, 854, 118 S. Ct. 1708, 1720 (1998). The Court now considers whether Plaintiffs state a claim on which relief may be granted under § 1983.

1. The Commonwealth Constitution

Section 1983 provides remedies for deprivations of rights

established elsewhere in the Constitution or federal laws. See Kneipp v. Tedder, 95 F.3d 1199, 1204 (3d Cir. 1996) (citations omitted) (emphases added). As such, Plaintiffs may not invoke the protections of the Commonwealth Constitution under § 1983 cause of action. Accordingly, to the extent that relief is sought under the Commonwealth Constitution, Plaintiffs' § 1983 claims against the City, Stewart, and Caffey must be dismissed.

2. The Fourth Amendment

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. The Fourth Amendment protects individuals against unlawful search and seizure. In order to establish a claim under the Fourth Amendment, a plaintiff must show that the actions of the defendant: (1) constituted a "search" or "seizure" within the meaning of the Fourth Amendment, and (2) were "unreasonable" in light of the surrounding circumstances. See, e.g., Brower v. County of Inyo, 489 U.S. 593, 595-600, 109 S. Ct. 1378 (1989) (affirming two-fold analysis).

A seizure is a restraint of liberty by show of force or authority. See Florida v. Bostick, 501 U.S. 429, 434 (1991). A seizure occurs when a reasonable person in the position of the plaintiff would not feel free to decline a request of a government agent or to terminate an encounter with a government agent. See

Bostick, 501 U.S. at 436; INS v. Delgado, 466 U.S. 210, 218 (1985). A "seizure" sufficient to implicate Fourth Amendment rights can occur when "an unintended person or thing is the object of the detention or taking." Brower v. County of Inyo, 589 U.S. 593, 109 S. Ct. 1378 (1989) (citations omitted). Nevertheless, "the taking itself must be willful." Id. As stated by the Supreme Court, willfulness "is implicit in the word 'seizure,' which can hardly be applied to an unknowing act." Id. Thus, "violation of the Fourth Amendment requires an intentional acquisition of physical control." Id.

It is not disputed that the defendants are state actors who acted under the color of state law and the Court thus assumes as true these legal prerequisites to this cause of action. Therefore, to establish a Fourth Amendment violation under the circumstances of this case, Plaintiffs must prove that Stewart and Caffey effected a "seizure" of the decedent's person and that their conduct was unreasonable. See Carroll v. Borough of State College, 854 F. Supp. 1184 (M.D. Pa. 1994), aff'd, 47 F.3d 30 (3rd Cir. 1995). Plaintiffs contend Stewart and Caffey violated the Decedent's Fourth Amendment rights when they "seized" him and started administering CPR. (See Pls.' Resp. at 7-8). Plaintiffs contend that the seizure was unreasonable because Stewart and Caffey neither had the appropriate medical device for removing the

grape lodged in the Decedent's throat nor the proper oxygen delivery device. (See Pls.' Resp. at 7-8).

The Complaint does not sufficiently allege that an unlawful seizure occurred. First, it is clear that neither Stewart nor Caffey acted with the requisite intent or willfulness to commit a Fourth Amendment violation. Second, when Stewart and Caffey administered CPR to the Decedent, they did not unlawfully restraint his liberty by a show of force or authority. Third, while acting on the Decedent's behalf, Morris was neither under an obligation imposed upon her, acting pursuant to the request of, nor engaged in an encounter with a government agent within the meaning of the Fourth Amendment. Stewart and Caffey, who were summoned to the scene through the willful efforts of Morris to assist her choking nephew, arguably may have acted negligently but their actions do not amount to a violation of the Decedent's constitutional rights. As Plaintiffs do not allege facts sufficient to uphold a Fourth Amendment claim, their § 1983 claims against the City, Stewart, and Caffey will be dismissed to the extent that relief is sought under the Fourth Amendment.

C. The Fourteenth Amendment

The Fourteenth Amendment states in pertinent part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV. In DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S.

189, 109 S. Ct. 998 (1989), the Supreme Court noted that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." Id. at 195, 109 S. Ct. 998. To establish a violation of Fourteenth Amendment rights under § 1983, a plaintiff must demonstrate that the state actor defendant's actions under color of state law deprived him of life, liberty, or property without due process of law. See Ploucher v. City of Philadelphia, CIV.A. No. 94-7036, 1995 WL 458980, at *4 (E.D. Pa. July 31, 1995). Plaintiffs seek recovery against Stewart and Caffey under the state-created danger theory of § 1983 liability; they seek recovery against the City under the "policy or custom" theory of municipal liability under § 1983. Each theory of liability is considered below.

1. State-created danger theory

The DeShaney Court recognized "that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." Id. at 198, 109 S. Ct. 998; see also Robinson v. California, 370 U.S. 660, 82 S. Ct. 1417 (1962) (recognizing that the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the States through the Fourteenth Amendment's Due Process Clause, requires the State to provide adequate medical care to incarcerated prisoners); Youngberg v.

Romeo, 457 U.S. 307, 102 S. Ct. 2452 (1982) (holding that the substantive component of the Fourteenth Amendment's Due Process Clause requires the State to provide involuntarily-committed mental patients with such services as are necessary to ensure their "reasonable safety" from themselves and others); Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 103 S. Ct. 2979 (1983) (holding that the Due Process Clause requires the responsible government or governmental agency to provide medical care to suspects in police custody who have been injured while being apprehended by police). The DeShaney Court explained:

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf--through incarceration, institutionalization, or other similar restraint of personal liberty--which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

489 U.S. at 200, 109 S. Ct. 998. The above holdings led to the formulation of "state-created danger" theory of Fourteenth Amendment liability. Plaintiffs seek to recover against Stewart and Caffey under this theory.

The substance of the state-created danger theory is "that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." Id. at 199-200, 109 S. Ct. 998. The rationale is that "when the State by the affirmative exercise of its power so

restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs--e.g., food, clothing, shelter, medical care, and reasonable safety--it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause". Id. at 200, 109 S. Ct. 998. "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." Id.

In Kneipp v. Tedder, 95 F.3d 1199 (1996), the Third Circuit adopted the state-created danger theory of § 1983 liability and enumerated therein a four part test that a plaintiff must satisfy to prevail on a claim based upon a danger created by a state actor: (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; and (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the harm to occur. See id. at 1208 (citing Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3rd Cir. 1995) ("stating that cases predicating constitutional liability on a state-created danger theory have four common elements)).

Plaintiffs's Complaint expressly alleges facts to satisfy the elements of the Kneipp test. Plaintiffs' Complaint states as follows:

> (a) [Stewart and Caffey's] actions created forseeable and fairly direct harm to the [D]ecedent and plaintiffs; (b) their actions evidenced willful disregard of harm for the [D]ecedent and the plaintiff; (c) a relationship existed between the parties; and (d) their actions created and/or increased a danger to the decedent that otherwise would not have existed.

(Compl. at ¶ 36). Defendants argue that at the most, the actions of Stewart and Caffey amount to negligence and that mere negligence cannot support recovery under the state-created danger theory of § 1983 liability. (Mot. to Dismiss at 8). They also argue that Plaintiffs allege no facts that would support a claim for a Fourteenth Amendment violation. (Mot. to Dismiss at 8). At this juncture, however, the Court finds that upon review of Plaintiffs' Complaint, the allegations contained therein are sufficient to survive the instant Motion to Dismiss. Accordingly, Defendants' Motion will be dismissed and Plaintiffs' § 1983 claim under the Fourteenth Amendment will be allowed to proceed.

2. Policy or Custom Theory

Under § 1983, a municipality may be found liable where "the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government is responsible for under § 1983." Monell v. Department of Soc.

Serv., 436 U.S. 658, 694, 98 S. Ct. 2018, 2037-28 (1978). It must be shown that the official custom or policy caused the deprivation of a constitutionally-protected right. See Beck v. City of Pittsburgh, 89 F.2d 966, 972 n.6 (3d Cir. 1996).

The Third Circuit identified two ways in which a municipal entity's policy or custom may be established:

> Policy is made when a decisionmaker possess[ing] final authority to establish municipal policy with respect to the action issues an official proclamation, policy, or edict. A course of conduct is considered to be a "custom" when, though not authorized by law, such practices of state officials [are] so permanent and well settled as to virtually constitute law.

Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990) (citations and internal quotation marks omitted). "In either of these cases, it is incumbent upon a plaintiff to show that a policymaker is responsible either for the policy or, through acquiescence, for the custom." Id. A failure to train employees may be sufficient to impose municipal liability, but only if that failure amounts to deliberate indifference to the rights of persons with whom the municipal employees come into contact. See Faust v. Powell, No. CIV.A. 99-4080, 2000 WL 193501, at *1 (E.D. Pa. Feb. 18, 2000) (quoting Montgomery v. DeSimone, 159 F.3d 120, 126-27 (3d Cir. 1998)). It must also be shown the municipal entity's policy or custom was the proximate cause of the injuries sustained. See Kneipp v. Tedder, 95 F.3d 1199, 1213 (3d Cir. 1996). The plaintiff must establish a "plausible nexus" or "affirmative link" between the municipality's custom and the specific deprivation of a

constitutional right. See id. The trial court must evaluate a plaintiff's municipal liability claims separately from the claims against the individual municipal employees. See id.; see also Fagan v. City of Vineland, 22 F.3d 1283, 1293, 94 (3d Cir. 1994)

Defendants argue for dismissal on the basis that where there is no constitutional violation by a municipal employee, there can be no liability on the part of the municipality. (See Mot. to Dismiss at 9 (citing City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986)). As this is not the law in the Third Circuit, Defendants' argument is not dispositive. Review of the Complaint reveals that the Plaintiffs state a claim of municipal liability under § 1983's policy or custom theory. As such, Defendants' Motion to Dismiss will be denied with regard to Plaintiffs' Fourteenth Amendment claim against the City.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARMAINE BROWN and ORAL DOUGLAS in their individual capacities and as Administrator of the Estate of SCHACQUIEL A. DAVIS	:	CIVIL ACTION
v.	:	
COMMONWEALTH OF PENNSYLVANIA, et al.	:	NO. 99-4901

O R D E R

AND NOW, this day of May, 2000, upon consideration of the defendants City of Philadelphia (the "City"), Mark T. Stewart ("Stewart"), and John Caffey's ("Caffey") Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (Docket No. 4), plaintiffs Charmaine Brown and Oral Douglas's (collectively, the "Plaintiffs") response thereto (Docket No. 9), defendant the Commonwealth of Pennsylvania Department of Health's (the "Commonwealth") Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) (Docket No. 8), Plaintiffs' response thereto (Docket No. 10), and the Commonwealth's reply brief (Docket No. 11), IT IS HEREBY ORDERED that:

(1) the City of Philadelphia, Mark T. Stewart, and John Caffey's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (Docket No. 4) is **GRANTED** with regard to Plaintiffs' claims under both the Commonwealth Constitution and the Fourth Amendment and **DENIED** with regard to Plaintiffs' claims under the Fourteenth Amendment; and

(2) the Commonwealth of Pennsylvania Department of Health's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) (Docket No. 8) is **GRANTED**.

BY THE COURT:

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HERBERT J. HUTTON, J.